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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1942.

No. 201.

TROJAN POWDER COMPANY,

*Petitioner,*

*against*

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

PETITION FOR REHEARING.

JAMES H. HERBERT,  
KENNETH SOUSER,  
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New York, N. Y.

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PETITION FOR REHEARING.

*To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

Trojan Powder Company petitions for rehearing of its petition for a writ of certiorari, which was denied on October 18, 1943.

For the convenience of the Court, petitioner states, without discussion, the main reasons advanced by it in its petition in support of the writ.

1. The decision of the Court of Appeals for the Third Circuit in the case at bar, *Trojan Powder Company v. National Labor Relations Board*, 135 F. (2d) 337, is in conflict with the decision of the Circuit Court of Appeals for the Second Circuit in *National Labor Relations Board v. American Tube Bending Company*, 134 F. (2d) 993.

2. The Circuit Court of Appeals, in the case at bar, erred in holding that it had no authority to interfere with the findings made by the Board. This is so in view of the finding of the Court below that the language used by the petitioner in letters sent to its employees was innocuous and that the evidence was capable of a conclusion either in favor of the petitioner or against it.

3. The facts set forth in these letters, and the statements made, were privileged under the First Amendment of the Constitution of the United States.

#### ARGUMENT IN SUPPORT OF THE PETITION FOR REHEARING.

Petitioner submits that no consideration was given by the Court below to the constitutional rights of the petitioner under the First Amendment. It suggests that perhaps in the petition for the writ of certiorari, this was not made sufficiently clear.

In *National Labor Relations Board v. American Tube Bending Company*, *supra*, L. Hand, C. J., writing for the Second Circuit, said:

“The question may be divided into two parts: first, whether the statements in the letter and the speech uttered at that time and under those circumstances could be regarded as coercive at all; second, if so, whether they were privileged under the First Amendment.”

Petitioner is in full accord with the above quoted statement. It most earnestly submits, however, that in the case at bar, the Circuit Court of Appeals for the Third Circuit, although the same issue was raised, failed to give any consideration whatsoever to the question of whether the state-

ments or the language used by the petitioner were privileged under the First Amendment.

The failure to give consideration to this question is not a mere academic question. Nor can it be said that the language used and the statements made were of such nature and so obviously not privileged that the Court below felt it unnecessary to consider this question. The Court below made no definite finding that the statements were coercive. It held merely that it could not say that the facts outlined were incapable of sustaining the conclusion of coercion found by the Board.

As can be seen from the Record and from the opinion of the Circuit Court of Appeals, the alleged coercion as found by the Board amounted to nothing more than statements of fact or expressions of opinion. There is no suggestion that any of them constituted threats.

Indeed, the Court below described some of the language as innocuous and the statements made as lacking venom (R. 94, 95-96). In speaking of the letters, the Court said at R. 94 (fol. 104):

“Much of their language is innocuous and indeed, standing by itself, could hardly receive anything but an innocent interpretation.”

Again referring to the letters, at R. 95 (fol. 105):

“That closes the series of letters. They are carefully worded; certainly, there is no threat explicit in the language used.”

In considering the statements made, the Court below said, at R. 95-96 (fol. 106):

“Except for the last statement, what the supervisory employees said, like the letters, lacks the

venom found in many other cases, some of them in this Circuit."

The "last statement" referred to in the above quote was purely an expression of opinion by one foreman who was in charge of a small division of the plant.

Neither the Court below nor the Labor Board found that any of the facts stated were obviously false or any opinion expressed to be other than an honest belief.

Certainly, statements of fact or expressions of opinion such as these should be considered privileged.

The failure of the Court below under these circumstances to consider whether they were in fact privileged under the First Amendment constitutes a most serious omission amounting to the deprivation of the petitioner's rights guaranteed to it under the Constitution of the United States.

#### THE ISSUE WAS PROPERLY BEFORE THE COURT BELOW.

The Board filed in the Circuit Court of Appeals for the Third Circuit a petition for enforcement of the order of the National Labor Relations Board. R. 72 (fol. 72). In due course, an answer was filed on behalf of the Trojan Powder Company. Paragraph Eighth of this answer reads as follows:

"The said findings of the Board are an unreasonable interference with Respondent's exercise of its right of free speech as guaranteed by the Constitution of the United States." R. 88 (fol. 96).

There can be no doubt, therefore, that the petitioner herein pleaded its Constitutional privilege. The question of petitioner's rights under the First Amendment was dis-

cussed and argued in the briefs filed on its behalf in the Circuit Court of Appeals.

Despite these facts, as will be seen from the Circuit Court's opinion, no consideration whatsoever was given to petitioner's Constitutional rights. The opinion of the Circuit Court, which begins on page 92 of the Record and ends at the top of page 97, contains not one word dealing with petitioner's rights under the First Amendment. For some reason, the Circuit Court apparently did not consider this an issue in the case. At R. 93, (fol. 103), the Court below said:

“Whether these findings are supported by substantial evidence is the principal question in the case and indeed the only question except for a minor one concerning the order requiring the posting of notices.”

Thus the Court below so confined the issues as to eliminate from consideration petitioner's contention that its Constitutional rights had been violated. Petitioner therefore has in effect been deprived of proper consideration by the Court of its Constitutional privileges.

The order of enforcement contained, among other things, a direction that the petitioner post notices in conspicuous places throughout its plant, stating that it will not engage in conduct from which it was ordered to cease and desist. Such a notice has been posted and is presently on the bulletin board of the Company in accordance with the order.

Petitioner submits that the posting of this notice should not be considered as any waiver of its rights, as the notice was posted to avoid any contention that this petition was being made solely for the purposes of delay.

Petitioner respectfully requests that this Court grant a rehearing so that petitioner may be afforded the opportunity of having its Constitutional rights considered by this Court, or that the case be remanded to the Circuit Court of Appeals for a determination of this issue.

Respectfully submitted,

JAMES H. HERBERT,  
KENNETH SOUSER,  
ROBERT A. LILLY,  
Counsel for Petitioner,  
New York, N. Y.

November 10, 1943.

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I certify that I am familiar with the contents of the foregoing petition and with the preparation thereof, and that the same is presented in good faith and not for delay.

JAMES H. HERBERT,  
New York, N. Y.

November 10, 1943.

